Supreme Court, U.S.
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No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES F. GRESHAM,

Petitioner,

—v.—

WILLIAM HENDERSON, Postmaster General,
United States Postal Service,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED

1. May a federal agency refuse to treat a person with epilepsy as disabled within the meaning of Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791 ("Section 501"), during the hiring process because of mitigating measures such as medication, and thereby avoid its affirmative duties to reasonably accommodate a disabled applicant for employment?

2. Does the circuit court's refusal to decide on appeal the merits of petitioner's claim that the federal agency failed to perform its affirmative duty to accommodate violate the Due Process Clause of the Fifth Amendment to the United States Constitution?

3. Must a federal government employer, pursuant to Section 501 of the Rehabilitation Act, consider as a reasonable accommodation during the employment application process the current mitigated state of a known disabling condition, which previously manifested itself in a record of poor job performance in the unmitigated state and led to dismissal for cause?

4. Was the jury instruction, "Qualified Individual With A Disability" patently plainly erroneous and prejudicial under Section 501 of the Rehabilitation Act because it delegated to the jury the legal question of whether the United States Postal Service satisfied its affirmative duties of reasonably accommodating a qualified handicapped individual during the hiring process?

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption. William Henderson, Postmaster General, United States Postal Service, was substituted as Respondent pursuant to Sup. Ct. R. 35(3).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET DECIDED BY THIS COURT: THAT MITIGATING MEASURES SUCH AS MEDICATION SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON IS "HANDICAPPED" UNDER THE REHABILITATION ACT OF 1973, AND THE FACT THAT A DISABILITY IS IN A STATE OF MITIGATION BECAUSE OF MEDICATIONS DOES NOT OBVIATE A FEDERAL AGENCY'S HEIGHTENED AFFIRMATIVE DUTY TO REASONABLY ACCOMMODATE UNDER SECTION 501 OF THE ACT	7

PAGE

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IN DECLINING TO ADDRESS CLAIMS THAT RESPONDENT FAILED TO MEET ITS SECTION 501 AFFIRMATIVE DUTY, SO DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER 12

III. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS OTHER CIRCUITS 15

IV. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 22

CONCLUSION 23

APPENDIX

Appendix A—March 10, 1999 Order denying rehearing 1a

Appendix B—December 14, 1998 Order and Judgment 3a

Appendix C—29 U.S.C. § 791(b) 7a

Appendix D—29 C.F.R. § 1613.701 ..... 8a

Appendix E—29 C.F.R. § 1613.702 ..... 8a

Appendix F—29 C.F.R. § 1613.703 ..... 10a

Appendix G—29 C.F.R. § 1613.704 ..... 10a

Appendix H—29 C.F.R. § 1614.203(d)(1) 11a

Appendix I—29 C.F.R. § 1630.2(o)(i) 12a

PAGE

Appendix J—USPS Handbook Policy 313.53 ..... 13a

Appendix K—Jury Instruction No. 16 ..... 14a

Appendix L—Pages 403-407 of the Trial Record 15a

Appendix M—Plaintiff's Post-Trial Motion for Judgment NOV and Motion for New Trial..... 19a

Appendix N—OPM Disability and Special Entitlements Division Decision Summary 21a

Appendix O—Postal Service Medical Assessment of Charles Gresham, dated 10-18-85, and signed by Dr. William E. Hill 25a

Appendix P—August 4, 1992 letter RE: Charles Gresham from Jeanne Ann King, M.D..... 27a

TABLE OF AUTHORITIES

Cases Cited: PAGE

Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) 21

Boddie v. Connecticut, 401 U.S. 371 (1971)..... 14

Bragdon v. Abbott, ___ U.S. ___, 118 S.Ct. 2196 (1998) 23

Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993) 11

Crane v. Lewis, 551 F.Supp. 27 (D.D.C. 1982)..... 11

Dandridge v. Williams, 397 U.S. 471 (1970) 23

Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) 19

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 17

Little v. FBI, 1 F.3d 255 (4th Cir. 1993) 18, 19

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 14

Longoria v. Harris, 554 F.Supp. 102 (S.D. Tex. 1982) 17

Maddox v. University of Tennessee, 62 F.3d 843 (6th Cir. 1995) 19

Manotele v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 11, 12

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 14

Newland v. Dalton, 81 F.3d 904 (9th Cir. 1996)..... 18

PAGE

Poindexter v. Atchison, Topeka and Santa Fe Railway Co., 168 F.3d 1228 (10th Cir. 1999) 21

Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) 17

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 22

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 14, 15

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 12, 22

Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) 17

Taub v. Frank, 957 F.2d 8 (1st Cir. 1992)..... 19

Teahan v. Metro-North Commuter R. Co., 951 F.2d 511 (2nd Cir. 1991) 19

Walker v. Mather (In re Walker), 959 F.2d 894 (10th Cir. 1992) 12

Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996) ... 18

Woodman v. Runyon, 132 F.3d 1330 (10th Cir. 1997) 11

(the following cited cases have been granted or are pending certiorari)

Albertsons, Inc. v. Hallie Kirkingburg, No. 98-591 (Certiorari granted and oral argument presented) 16

Allison Deas v. River West, L.P. et al., No. 98-1057 (Certiorari petition pending) 16, 17, 23

Karen Sutton and Kimberly Hinton v. United Airlines, Inc., No. 97-1493 (Certiorari granted and oral argument presented) 10, 16

PAGE

Vaughn L. Murphy v. United Parcel Service, Inc., No. 97-1992 (Certiorari granted and oral argument presented) 10, 16, 17

Zimring v. Olmstead, No. 98-536 (Certiorari granted and oral argument presented) 16

Statutes and Regulations Cited:

28 U.S.C. § 1254 2

28 U.S.C. § 1291 15

29 U.S.C. § 706(7) 8, 10

29 U.S.C. § 791 ..... 2, 3, 8, 15

42 U.S.C. § 12101 *et seq.* 7

29 C.F.R. § 1613.701 3

29 C.F.R. § 1613.702 ..... 3, 8, 9

29 C.F.R. § 1613.703 ..... 3, 20

29 C.F.R. § 1613.704 ..... 3, 20

29 C.F.R. § 1614.203(d)(1) 2, 3

29 C.F.R. § 1630.2(o)(i) 3, 8

United States Constitution Cited:

Fifth Amendment 2, 14, 15

Fourteenth Amendment 14

PAGE

Rules Cited:

Supreme Court Rule 10 ..... 12, 15

Supreme Court Rule 35.3 ii

Federal Rule of Civil Procedure 50 ..... 6, 13

Federal Rule of Civil Procedure 59 ..... 6, 13

Other Authority Cited:

AMERICANS WITH DISABILITIES ACT, § 3.03 (Ogletree, Deakins, et al.; Matthew Bender 1997) 10

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles F. Gresham respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on December 14, 1998.

OPINIONS BELOW

The opinion of the Tenth Circuit, which is not reported, is set out at pp. 3a-6a of the Appendix hereto. The March 10, 1999, decision of the court of appeals denying rehearing and rehearing en banc, which is also not reported, is set out at pp. 1a-2a of the Appendix.

JURISDICTION

The decision of the Tenth Circuit was entered on December 14, 1998. A timely petition for rehearing was denied on March 10, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This matter involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." It also involves Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(b), and relevant implementing regulations.

Part 29 C.F.R. § 1614.203(d)(1), provides in pertinent part:

> (d) *Employment Criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:
>
> (i) The agency demonstrates that the test score or other selection criterion is job related for the position in question and consistent with business necessity; and
>
> (ii) OPM or other examining authorities shows that job-related alternative tests, or the agency shows that job related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

29 U.S.C. § 791(b) is reproduced at p. 7a of the Appendix. 29 C.F.R. § 1614.203(d)(1) is reproduced at p. 11a of the Appendix. Other regulations involved, but not set forth ver-

batim, above, are reproduced in the Appendix as follows: Appendix D - 29 C.F.R. § 1613.701 (App. p. 8a); Appendix E - 29 C.F.R. § 1613.702 (App. pp. 8a-9a); Appendix F - 29 C.F.R. § 1613.703 (App. p. 10a); Appendix G - 29 C.F.R. § 1613.704 (App. p. 10a); Appendix H - 29 C.F.R. § 1614.203(d)(1) (App. p. 11a); and, Appendix I - 29 C.F.R. § 1630.2(o)(i) (App. p. 12a).

STATEMENT OF THE CASE

Petitioner, Charles F. Gresham ("Gresham"), although a person diagnosed with epilepsy, was employed by the United States Postal Service ("Postal Service" or "respondent") from 1966 until 1986. In July, 1986, Gresham was discharged on account of behavior he states was caused by his epilepsy. (App. p. 4a). The Postal Service's own physician, Dr. Hill, had also determined by October, 1985, that epilepsy-induced psychomotor seizures Gresham had suffered at work were what had caused him to "forsake his duties." (App. p. 25a, ¶3). Prior to his discharge Gresham had sought medical retirement. After his discharge petitioner was granted medical retirement from the Postal Service. The Office of Personnel Management's ("OPM") retirement decision (App. pp. 21a-24a) stated that petitioner's "date of incapacitation" was in May, 1986, *prior to his discharge*. (App. __p. 24a, § "5").

After his medical retirement petitioner remained severely disabled on account of his epilepsy, but in 1991 was treated with a new medication, Tegretol, which completely controlled his seizures. (App. pp. 4a & 28a). After experiencing over a year of successful control of his seizures, petitioner in 1993 applied to be rehired by the Postal Service, and specifically requested that the application process consider not only his new condition but that his past behavior was caused by his epilepsy.

The Postal Service, while considering Gresham's application for re-employment, reviewed a portion of petitioner's

work history, but not his Postal Service medical records.[1] (App. p. 4a). The Postal Service presented no testimony at trial on its case in chief. However, Ms. Linda Littleton, whom respondent stipulated made the decision not to rehire Gresham and whom Gresham called as a witness for his case in chief, testified that she did not consider Gresham to be "disabled" because his new drug therapy controlled his epilepsy. Ms. Littleton performed what she termed a "personal suitability decision" process, employing the respondent's internal agency policy that a prior record of discharge for cause would negate rehiring a former employee. (Policy attached at App. p. 13a.) Ms. Littleton stated that this "zero tolerance" policy negated any rehire where there was prior removal denominated "for cause," and this policy was applicable even to a request for accommodation for a disability in the employment application process. Ms. Littleton did not get to a consideration of Gresham's request for accommodation in the employment application process (i.e., Gresham's request for consideration that his prior work conduct was epilepsy-induced and/or scheduling a medical examination to evaluate his current condition), because respondent's agency policy regarding removal for cause rendered petitioner unfit at the outset.

Petitioner maintained in his complaint, pretrial order, at all stages of the trial proceeding including trial testimony, in his motion for directed verdict at close of evidence, and in his post trial motions for new trial and judgment n.o.v, that the

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[1] These medical records included those of both Gresham's then-treating physician, Dr. Prosser, who periodically advised the Postal Service circa 1982-1986 of Gresham's worsening epilepsy, that it was the cause of his aberrant behavior at work, and recommending medical retirement, *and* several examinations performed between 1982-1985 by the Postal Service's physician. The final "fitness for duty" examination performed by the Postal Service's physician, Dr. Hill, not only chronicled Gresham's past condition of epilepsy, but concluded that it had progressed by October, 1985, to the point where Gresham had psychomotor seizures *at work* leading him "to forsake his duties." (App. p. 25a at § 3).

Postal Service as a federal government agency had an affirmative duty to reasonably accommodate him, including accommodation in the application process: specifically, to consider that such past conduct was epilepsy-induced and to presently determine by medical evaluation that such past conduct was not likely to recur on account of his improved medication that controlled his seizures. (*See, e.g.*, App. pp. 5a, 15a-17a & 20a, ¶3.) It was undisputed below that the Postal Service refused to undertake such a present evaluation of Gresham's fitness for postal service, because of the reasons articulated by Ms. Littleton.

Importantly, the *only* testimony at trial of petitioner's current medical condition with his epilepsy controlled and of his attendant fitness for postal service at the time of his 1993 application for re-employment is that Gresham could in fact safely perform all functions of the job. This testimony came from Mr. Gresham, from a Postal Service worker currently holding that same job and who had knowledge of Gresham's current physical state under his new drug treatment, and from Gresham's current treating neurologist, Dr. King, who had earlier tendered a written report stating that because of the new medication Gresham, although still an epileptic could currently perform any job except that of a commercial airline pilot. (App. pp. 27a-28a). The Postal Service offered no evidence to counter this cumulative testimony that petitioner could in fact safely perform all necessary job functions of the position for which he applied.

Petitioner maintained his right to an individualized consideration of his employment application stemming from the Act and its implementing considerations. (App. p. 4a) Petitioner also argued that the Postal Service had supplanted federal statute with its own internal policy[2] by allowing its

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[2] In denying the Postal Service's motion for a directed verdict at the close of plaintiff's evidence, the trial judge held that a Postal Service policy or agency rule could not "trump" the requirements of the Act.

internal policy to "trump" the agency's affirmative duty(s) under Section 501 of the Act to reasonably accommodate a disabled job applicant. At close of all evidence, petitioner made a motion for directed verdict based upon the respondent's admitted refusal to accommodate Gresham in any manner (because of petitioner's "disqualification" under the respondent's personal suitability process). Relevant portions of this trial motion are included in the Appendix at pp. 15a-18a to illustrate that the issue of the respondent's failure to perform its affirmative duty to accommodate was in reality raised at trial.

The issues were submitted to a jury, which returned a general verdict in favor of the Postal Service. After jury verdict petitioner timely filed a Fed.R.Civ.P. Rule 50 Motion for Judgment N.O.V. and a Rule 59 Motion for new trial. That motion(s) is, also, attached as Appendix pp. 19a-20a. As numbered paragraph "3" of the post-trial motion(s) clearly shows, the issue of the Postal Service's failure to perform its Section 501 affirmative duty to reasonably accommodate was *again* raised before the trial court.

On appeal the Tenth Circuit affirmed the United States District Court for the Western District of Oklahoma, holding that the objected jury instruction was a correct statement of the law and holding that the issue of the Postal Service's failure to reasonably accommodate had not been raised below. (App. pp. 3a-6a). Petitioner timely sought rehearing referencing pleadings (both his Complaint and the Postal Service's Answer), testimony at trial, and the post-evidentiary motion for directed verdict and the Rule 50 & Rule 59 Motion for Judgment N.O.V. and Motion for New Trial, the latter of which are attached hereto as Appendices L & M to illustrate the issue had been extensively raised below. The Tenth Circuit declined rehearing. (App. pp. 1a-2a).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET DECIDED BY THIS COURT: THAT MITIGATING MEASURES SUCH AS MEDICATION SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON IS "HANDICAPPED" UNDER THE REHABILITATION ACT OF 1973, AND THE FACT THAT A DISABILITY IS IN A STATE OF MITIGATION BECAUSE OF MEDICATIONS DOES NOT OBVIATE A FEDERAL AGENCY'S HEIGHTENED AFFIRMATIVE DUTY TO REASONABLY ACCOMMODATE UNDER SECTION 501 OF THE ACT.

The Postal Service's rationale for denying petitioner's application for re-employment turned upon two factors: (1) Ms. Littleton did not consider Gresham to be a "disabled"[3] person when he sought reemployment in 1993, because his epilepsy was then under control by his new medication; and (2) Gresham's prior poor work record in and before 1986 culminating in his removal "for cause" precluded any accommodation during the 1993 application/re-employment process—even the consideration that his prior work record was not volitional, but was caused by psychomotor seizures at work. The respondent agency would not even consult or consider the historic records of its own physician, Dr. Hill, who had as early as October 18, 1985 definitively concluded that Gresham's poor work performance was induced by epileptic psychomotor seizures petitioner was suffering while on the job. (App. pp. 25a-26a).

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[3] The term *disabled*, as is used in the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, will normally be used rather than the Rehabilitation Act's "handicap."

Had the Postal Service conceded Gresham was in fact disabled at the time of his 1993 application for re-employment, it would have become problematic for the agency to reconcile its pre-selection suitability process with its affirmative duty to extend reasonable accommodations in the application process of a type as are recognized as appropriate in furtherance of the Act's policies. *See,* 29 C.F.R. § 1630.2(o)(i). (App. p. 12a; ADA implementing regulation).

Under 29 U.S.C. § 706(7)(B)[4], a "handicapped (disabled) individual" includes one who "has a physical or mental impairment which substantially limits one or more of such person's major life activities," or "has a record of such impairment." *Accord,* 29 C.F.R. § 1613.702(a). (App. p. 8a). Both the medical opinions of Dr. Hill (App. pp. 25a-26a) and later of Dr. King (App. pp. 27a-28a), as well as the decision of the Office of Personnel Management (App. pp. 21a-24a) establish that Gresham at all relevant times suffered from epilepsy/ organic brain syndrome. Such an illness is specifically described as fulfilling the requisite impairment by implementing regulation, 29 C.F.R. § 1613.702(b):

> (b) *Physical or mental impairment* means (1) any physiological disorder or condition . . . affecting one or more of the following body systems: Neurological; . . . or (2) any mental or psychological disorder such as . . . *organic brain syndrome* . . . . (Emphasis added.)

If a neurological condition and/or organic brain syndrome affects a person's work, as Gresham's epilepsy clearly did from an examination of Dr. Hill's 1985 fitness for duty medical report (App. p. 25a, § 3) or form an examination of the Office of Personnel Management's 1986 decision summary (App. pp. 21a-24a), then such an impairment is one which affects a "major life activity," pursuant to 29 C.F.R. § 1613.702(c):

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[4] Title 29 U.S.C. § 791 is contained within Subchapter V of Ch. 16 (Rehabilitation Services) and, therefore, subparagraph 706(7)(B), rather than subparagraph 706(7)(A), is controlling.

> (c) *Major life activities* means functions, such as . . . working.

Not only did Gresham unquestionably have a disabling illness, but because of the extensive Postal Service work record imbued with notations of his epilepsy, medications, seizures, and aberrant behavior stemming from seizures, Petitioner also had a "record of such disability" under 29 C.F.R. § 1613.702(d), which makes a "record of impairment" a disabling factor:

> (d) *Has a record of such an impairment* means has a history of, or has been classified . . . as having a mental or physical impairment that substantially limits one or more major life activities.

Respondent's Dr. Hill determined that petitioner's epilepsy/ organic brain syndrome had caused his work deficiencies by and before October, 1985, which thereafter precluded Gresham from customer contact, working around machinery, driving, etc. (App. p. 26a at § 5.) OPM determined that by May, 1986, Gresham was "incapacitated" and there was no reasonable accommodation to allow continuation of employment. (App. p. 24a, §§ 5, 6 & 7). Hence, by May, 1986, petitioner had not only a medically diagnosed condition of disability, but a record of same which had affected his job performance. It was this record, including petitioner's aberrant behavior exhibited during his historic psychomotor seizures at work, which caused Ms. Littleton to decide in 1993 to end the application at the "personal suitability" stage and not to proceed to even a determination if a reasonable accommodation could be made; i.e., to consider, as Dr. Hill clearly stated in 1985, that Gresham's historic work performance was caused by seizures . . . but which were not likely to recur given the mitigation of the illness by the new medication as reported in Dr. King's medical statement furnished to respondent with petitioner's 1993 application. (App. pp. 27a-28a).

When presented with both a history of disability and a present disability, there is nothing in the implementing regulations suggesting that a federal agency, without more, can elect to treat a person as not disabled because of the mitigating factor of medications. In fact, the definition of disability/handicap was extended by amendment in 1974 precisely to defeat such "avoidance" tactic. Senator Alan Cranston explained that the purpose of the extended definition in 29 U.S.C. § 706(7)(B) to include discrimination based upon consideration of a "record of disability," was to cover:

> ". . . persons who have recovered—in whole or in part—from a handicapping condition *such as mental or neurological illness*, but who may nevertheless be discriminated against on the basis of prior medical history . . .." (Emphasis added.) AMERICANS WITH DISABILITIES ACT, § 3.03 (Ogletree, Deakins, et al.; Matthew Bender 1997).

What Ms. Littleton did by avoiding the Rehabilitation Act's duties to accommodate upon the basis that she did not consider petitioner to be disabled, since medication now controlled his epilepsy, was not discernably different than what private employers, United Air Lines, Inc., and United Parcel Service, Inc., did with respect to their duties to accommodate under the ADA. The legal arguments raised by both petitioners and amicus curiae, Equal Employment Opportunities Commission, in *Karen Sutton and Kimberly Hinton v. United Airlines, Inc.*, No. 97-1493, and *Vaughn L. Murphy v United Parcel Service, Inc.*, No. 97-1992[5] are applicable and compelling to Mr. Gresham's Petition, but will not be here repeated in detail.

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[5] These cases both arose out of the Tenth Circuit and dealt, *inter alia*, with private employers' obligations under the Americans With Disabilities Act to accommodate employees who had disabling conditions, but which conditions were mitigated by medications, corrective lenses, or other prosthetic devices.

An even more compelling reason why mitigating factors cannot be used by a federal agency employer to avoid duties of accommodation, is the federal employer's heightened duties under Section 501 of the Rehabilitation Act. *Woodman v. Runyon,* 132 F.3d 1330, 1338-1346 (10th Cir. 1997). But in petitioner's case the Postal Service did not follow the process delineated in cases such as *Buckingham v. United States,* 998 F.2d 735, 740 (9th Cir. 1993) (cited with approval in *Woodman v. Runyon, supra*) or *Crane v. Lewis,* 551 F.Supp. 27 (D.D.C. 1982), which procedures require the federal agency to meet its duty by first gathering sufficient information from the applicant and experts in order to determine if reasonable accommodations are available commensurate with the safety of the applicant and co-workers, rather than employing only a subjective determination of possible, potential harm from employment of the disabled person. A federal agency employer, according to the law of the Ninth Circuit, must make such bona fide inquiry before refusing to affirmatively accommodate.

The Tenth Circuit avoided deciding the merits of petitioner's appellate claim that the respondent failed to perform its Section 501 mandated, affirmative duties, by holding the issue was not raised below. *See,* Proposition II, *infra.* The Tenth Circuit thus sanctioned the respondent's avoidance of its affirmative duties by allowing the Postal Service to: (1) consider petitioner as not disabled because of the mitigating effect of his new medication, and/or (2) by allowing use of a prior record of disability to preempt or avoid the reasonable accommodation in the hiring process of the consideration that Gresham's disability-induced behavior(s) of the mid-1980's would *not* recur because of the seizure control afforded by his new medications.

To allow the Postal Service to avoid its affirmative duties in such premises, places the Tenth Circuit in conflict with other Circuits to include the Ninth Circuit, *Buckingham v. United States, supra,* and *Manotele v. Bolger,* 767 F.2d 1416

(9th Cir. 1985), and is a consideration to grant the petition under Sup. Ct. R. 10(a). The employment criteria and hiring procedure employed in petitioner's case also conflict with the accommodation requirements of Section 501, as set forth in this Courts decision in *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979), warranting certiorari under Sup. Ct. R. 10(c).

But the precise issue petitioner's case presents: may a federal agency employer wholly avoid its Section 501 heightened, affirmative duties (duties which are *not* obligatory for private employers under Section 504 of the Act or under the ADA) because of the presence of mitigating factors such as medications, has not heretofore been decided by this Court and certiorari is thereby warranted, also, under Sup. Ct. R. 10(c).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IN DECLINING TO ADDRESS CLAIMS THAT RESPONDENT FAILED TO MEET ITS SECTION 501 AFFIRMATIVE DUTY, SO DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In its order affirming the judgment of the trial court, the Tenth Circuit dealt with petitioner's claim that the respondent failed to meet its Section 501 affirmative duties, by holding at page 5 of its Order and Judgment:

> Finally, we decline to address plaintiff's claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal. *See Walker v. Mather (In re Walker),* 959 F.2d 894, 896 (10th Cir. 1992) (appellate court will not consider on appeal that was not raised in district court).

(App. p. 6a).

Petitioner timely filed a Petition for Rehearing, advising the Tenth Circuit that it had misconstrued the record in holding the issue was raised for the first time on appeal, and further advising that the issue had been repeatedly raised below at the pleading stage by both the petitioner's Complaint and respondent's Answer; that it had also been raised at the evidentiary stage of the trial with specific reference to the trial testimony of petitioner where he described his requests to the Postal Service for consideration that his prior work record was caused by his epilepsy; that it had also been raised at the close of evidence by a motion for directed verdict (the pertinent portions of the trial transcript are reproduced on p. 15a-18a of the Appendix) which motion contained clear argument that respondent failed to meet its Section 501 affirmative duty, and that it had finally been raised below in petitioner's Fed.R.Civ.P. Rule 50(b) and Rule 59 post trial motion for judgment n.o.v. and motion for a new trial (attached as Appendix M) which motion clearly states at numbered paragraph 3:

> (3) The jury's verdict could in any event not obviate *the defendant agency's affirmative duty to extend a reasonable accommodation in the application process* to a disabled person who had adduced evidence, unrebutted at trial, that the medical condition which had caused his prior work record was now under complete medical control; and the *Court should in its equitable power and in aid of the legal requirement for an individualized remedy*, based upon the evidence that the plaintiff is and was at trial an otherwise qualified, disabled person, *enter judgment against the defendant based upon its failure to extend a reasonable accommodation, and further order that defendant extend a reasonable accommodation to plaintiff* by, first, acknowledging that the prior work record was in whole or substantial part a product of plaintiff's disability, then uncontrolled, and second, that the *defendant perform medical tests to confirm or deny*

> *Dr. King's opinion that Gresham's epilepsy and the byproducts thereof are now under medical control, allowing plaintiff to perform the essential job functions.* (Emphasis added.)

The Tenth Circuit's response to these specific citations to the trial Record where the issue had in fact been explicitly raised, was to enter its March 10, 1999 order that "Appellant's petition for rehearing is denied." (App. p. 1a).

In the case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), this Court held that the Fourteenth Amendment's Due Process Clause required at a minimum that deprivation of life, liberty or property be preceded not just by adequate notice, but by an opportunity for a hearing "appropriate to the nature of the case."

The Due Process Clause of the Fifth Amendment imposes the same requirement upon the federal courts. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982), *citing, Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958), and referencing this Court's traditional holding that "the Due Process clauses protect civil litigants who seek recourse in the courts," this Court reiterated its holding that:

> the "property" component of the Fifth Amendment's Due Process Clause . . . (imposed) "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

This Court in *Logan v. Zimmerman Brush Co., supra,* continued by reiterating its holding in *Boddie v. Connecticut,* 401 U.S. 371, 380 (1971), that the Fourteenth Amendment's Due Process Clause prevented the States from:

> denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

Appeal to the Circuit Courts is a matter of right. 28 U.S.C. § 1291. The Tenth Circuit's avoidance to rule upon a claim, not only clearly articulated to the Circuit Court but clearly and repeatedly urged to the trial court, upon the basis the issue was "raised for the first time on appeal" denies an opportunity to be heard as surely as if the trial court precluded any adjudication below.

Where denial of consideration of petitioner's major appellate claim is predicated upon a misconstruction of the record, in which misconstruction the Circuit Court persists even after the misconstruction of record is clearly demonstrated by the appellate party whose substantive appellate claim is ignored, then such denial of an appellate decision upon the gravamen of the appeal is tantamount to denial of an opportunity to be heard. And in such circumstance this Court, as it stated in *Societe Internationale v. Rogers, supra,* and under Sup. Ct. R. 10(a), should impose the Fifth Amendment's requirement for a meaningful hearing as a limitation upon the Circuit Court's discretionary power to decline to decide a properly presented appellate claim, and remand the matter to the Tenth Circuit with instructions to decide the respondent's duty to meet its Section 501 duties under the factual record presented by the trial evidence.

III.

THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS OTHER CIRCUITS

This case concerns the Tenth Circuit's construction and interpretation of the affirmative action duties imposed on federal government employers under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, and appurtenant regulations, to reasonably accommodate a qualified handicapped individual. This case, along with the other disability

cases currently before the Court,[6] presents the opportunity to provide lower courts with clear guidelines for determining whether a federal government employer has satisfied its heightened Section 501 duties to determine whether a handicapped person is qualified for employment. In addition, this case presents the opportunity to provide lower courts and federal government employers with a single, clear standard for resolving the "mitigating measures" and "handicapped" issue under Section 501 of the Rehabilitation Act. Finally, this case presents the opportunity to provide lower courts and, both, private and federal government with a single, clear standard for addressing job performance deficiencies that are symptomatic of a disability or handicap.

A. Mitigating Measures

The evidence at trial was undisputed that the respondent took no affirmative steps during the petitioner's reemployment application process to reasonably accommodate Mr. Gresham's known disability of epilepsy because the respondent did not consider Mr. Gresham to be "disabled" due to his seizure-free epileptic condition which was the result of mitigation measures of tegretol monotherapy. The opinion below upholding Jury Instruction No. 16, and the respondent's approach to Mr. Gresham's seizure-free handicap condition, which is a result of the mitigating measures of tegretol monotherapy, are consistent with the Tenth Circuit's approach taken in the two ADA cases currently pending before this Court, *i.e.*, *Karen Sutton and Kimberly Hinton v. United Airlines, Inc.*, No. 97-1943; *Vaughn L. Murphy v. United Parcel Service, Inc.*, No. 97-1992. However, unlike the *Sutton* and

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[6] Oral arguments in the following ADA disability cases: *Karen Sutton and Kimberly Hinton v. United Airlines, Inc.*, No. 97-1943; *Vaughn L. Murphy v. United Parcel Service, Inc.*, No. 97-1992; *Albertsons, Inc. v. Hallie Kirkingburg*, No. 98-591; and, *Zimring v. Olmstead*, No. 98-536, have been heard and the decisions of this Court are pending. In addition, a *cert.* petition is pending in another ADA disability case involving epilepsy, *Allison Deas v. River West, L.P. et al.*, No. 98-1057.

Murphy cases, which were brought under the ADA, this case is brought against a federal government employer under Section 501 of the Rehabilitation Act.

Although courts have not squarely addressed the mitigating measures issue under the Rehabilitation Act, courts routinely treat persons who have mitigated the effects of their impairment as protected by the statute. *See, e.g., Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) ("Reynolds's epilepsy substantially limits her ability to work. Even though medication controls her seizures, federal and state regulations and policies restrict the types of jobs available to her."); *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) ("undisputed" that applicant whose hearing aid corrected for hearing impairment "is a handicapped person"); *Longoria v. Harris*, 554 F.Supp. 102, 103-104 (S.D. Tex. 1982) (individual with right leg amputated below the knee who "was in no way restricted in mobility by his artificial leg" was handicapped individual).

A certiorari petition is pending in *Allison Deas v. River West, L.P., et al., Case No. 98-916*. Unlike this case, *Deas v. River West L.P., et al.* is brought under the ADA. However, as in this case, *Deas v. River West L.P., et al.* involves epileptic seizures. Accordingly, Mr. Gresham requests that this Court grant review of this case due to the importance of the related questions presented in the four disability cases under review, referenced, *supra*, grant review of *Deas v. River West, L.P., et al.*, and decide his case as a companion case to *Deas v. River West, L.P., et al. See Gordon v. New York Stock Exchange*, 422 U.S. 659, 663 (1975).

B. Manifestations of Disabling Medical Conditions

Perhaps the greatest opportunity to resolve a conflict among the Circuits afforded by this case concerns the different approaches regarding employers' responses to behavior or performance deficiencies that are manifestations of a disabling condition. Whether an employer's adverse action

taken in response to a person's poor behavior or job performance that is a manifestation of a disabling medical condition renders a handicapped person "not qualified" or whether it will be deemed discrimination "because of handicap", frequently turns on the district court or Circuit where the complaint is brought.

For example, there are two general approaches for addressing misconduct that is a manifestation of a disabling condition under the Rehabilitation Act. The First, Fourth, Sixth, Seventh, and Ninth Circuits follow the general approach adopted by the Tenth Circuit in *Williams v. Widnall*, 79 F.3d 1003, 1006-1007 (10th Cir. 1996) (agreeing with the Fourth Circuit's statement that "an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped.") (*citing, Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993)). In *Williams*, a Section 501 case, the Tenth Circuit held that an alcoholic suing under Section 501 of the Rehabilitation Act was disabled, but was not "qualified" because his misconduct of making threats toward a supervisor could not be reasonably accommodated without undue hardship because his threats to his supervisor and coworkers continued in spite of his treatment for alcoholism. *Williams v. Widnall*, 79 F.d at 1006. In *Williams*, the Tenth Circuit adopted the consensus approach that an employer subject to the Rehabilitation Act may take adverse action against a disabled employee in response to egregious misconduct that is a manifestation of a disabling condition "irrespective of whether the employee is handicapped." *Id.* at 1007. This general approach to an employer's response to an employee's misconduct that is a manifestation of a disabling condition under the Rehabilitation Act is the majority approach among the Circuits. *See, e.g., Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (civilian Navy employee discharged after he attempted to fire assault rifle at bar patrons while on "drunken rampage" was terminated for misconduct not "because of"

disability); *Maddox v. University of Tennessee*, 62 F.3d 843, 848 (6th Cir. 1995) (alcoholic football coach fired after well-publicized DWI incident was not discharged "because of" alcoholism but rather because of misconduct; "while alcoholism might compel Maddox to drink, it did not compel him to operate a motor vehicle or engage in the other inappropriate conduct reported"); *Despears v. Milwaukee County*, 63 F.3d 635, 636-37 (7th Cir. 1995) (demotion of maintenance worker whose driver's license was revoked after fourth DWI conviction was not solely because of alcoholism; "a cause is not a compulsion (a sole cause); and we think the latter is necessary to form the bridge that Despears seeks to construct between his alcoholism and his demotion . . . But Despears' alcoholism was not the only cause of his being convicted of drunk driving. Another cause was his decision to drive while drunk."); *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993)(Rehabilitation "Act does not protect alcoholics or drug addicts from the consequences of their misconduct."; *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992) (heroin addict discharged for misconduct of heroin possession, rather than for his heroin addiction).

On the other hand, in the Second Circuit, an employer's adverse action taken in response to an employee's misconduct that is a manifestation of a disabling condition is considered "discrimination because of disability." This minority general approach was adopted in the Second Circuit in *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 517 (2nd Cir. 1991), *cert. denied*, 506 U.S. 815 (1992). In *Teahan*, the Second Circuit held that an employee's termination by an employer subject to the Rehabilitation Act which was justified as being due to absenteeism shown to be caused by substance abuse is termination "solely by reason of" that abuse for purposes of the Rehabilitation Act.

Section 501 and its implementing regulations clearly impose upon a federal employer an affirmative duty to reasonably accommodate a known handicap in determining a

handicapped person's qualifications for federal employment. The regulations implementing Section 501 provide the "Agencies shall give full consideration to the hiring . . . of qualified . . . handicapped persons. The Federal Government shall become a model employer of handicapped individuals . . . [and] shall not discriminate against a qualified physically or mentally handicapped person." 29 C.F.R. § 1613.703 (Section 1613.703 is reproduced in the Appendix at p. 10a). In addition, the regulations mandate that a federal government employer "shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant . . . unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a) (Section 1613.704(a) is reproduced in the Appendix at p. 10a).

In addition, Jury Instruction No. 16, "Qualified Individual With A Disability", is set out at p. 14a of the Appendix and states:

> "The term 'qualified individual with a disability,' as used in these instructions, means an individual with a disability who nevertheless can perform the essential functions of the employment position he holds or desires, either with or without a reasonable accommodation, and who meets experience and education requirements of the position. Also, to be qualified, a person must be able to perform the desired job without endangering the health or safety of himself or others.
>
> In this case, the essential functions of the job Mr. Gresham sought as a Distribution Clerk are described in Defendant's Exhibit 15. He claims that he could perform these functions without receiving any accommodation whatsoever.
>
> There exists a Postal Service regulation that declares an employee ineligible for reinstatement once he has been removed from service for cause. This regulation

> does not override the Postal Service's obligation under the Rehabilitation Act to give individualized consideration to an application for reinstatement by an otherwise qualified individual with a disability. To establish that he is otherwise qualified, however, a disabled person seeking reinstatement must prove that his prior removal was caused by a disabling condition that has improved and is not likely to recur. *If the Postal Service had grounds for genuine concern that past problems would recur, it was not required to consider plaintiff's application further.*"

(App. p. 14a.) (Emphasis added.)

This Court should grant certiorari and resolve the split among the Circuits by holding that manifestations of a disabling medical condition does not abrogate a federal government employer's heightened affirmative duties under Section 501 to reasonably accommodate a handicapped person seeking employment. As a result of Jury Instruction No. 16, the Postal Service was absolved of its Section 501 affirmative duties to reasonably accommodate Mr. Gresham's current mitigated state of epilepsy disability wherein he is seizure-free. Because of his prior record of misconduct and poor job performance which was a manifestation of his unmitigated disabling condition of epileptic seizures, pursuant to Jury Instruction No. 16, "Qualified Individual with a Disability", Mr. Gresham was unduly prejudiced. This Court should grant certiorari, reverse, and remand. *See Poindexter v. Atchison, Topeka and Santa Fe Railway Co.*, 168 F.3d 1228, 1232 (10th Cir. 1999); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

IV.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The decision below is inconsistent with the rulings of this Court regarding the affirmative duties of a federal government employer to reasonably accommodate a handicapped person under the Rehabilitation Act. This Court's opinions in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 nn.17 & 19 (1987) (employers have an affirmative obligation to make a reasonable accommodation to an employee unless the reasonable accommodation would cause "undue hardship"); and, in *Southeastern Community College v. Davis*, 442 U.S. 397, 410-12, (1979) (Section 501 explicitly requires federal government employers to undertake "affirmative action") gave effect to the guiding principle that employers subject to the Rehabilitation Act have an affirmative obligation to reasonably accommodate an individual with a known handicap unless to do so would cause undue hardship. *Id.* Moreover, this Court's opinion in *Arline* indicated that a district court "will need to conduct an *individualized inquiry* and make appropriate findings of fact" in order to determine whether a handicapped individual can perform the essential functions of the job with a reasonable accommodation. *Arline*, 480 U.S. at 288-89 (emphasis added).

In this case, neither the district court nor the jury made any findings of fact regarding whether Mr. Gresham could perform the essential job functions of postal distribution clerk. The only evidence adduced at trial was that petitioner could—at the time of his 1993 application—safely and competently perform *all* functions of the job for which he applied. Especially because this case was brought against a federal government employer under Section 501 of the Rehabilitation Act, the district court should have made an individualized inquiry and findings of fact regarding whether petitioner could work as a distribution clerk.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. The Petitioner further requests that the Court grant review of this case and consolidate it with the other four disability cases under review, consolidate it with *Deas v. River West, L.P., et al.*, Case No. 98-916 (*cert.* petition pending), or simply hold this case pending the disposition of the other disability cases.

In the alternative, because the Court of Appeals below expressed no views on the Section 501, mitigation, or the manifestation of a disabling condition issues, it may be appropriate for this Court to simply remand the case rather than deal with the merits of those questions in this Court. *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2213 (1998) (*citing, Dandridge v. Williams*, 397 U.S. 471, 476, n.6 (1970)).

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Respectfully submitted,

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